

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Professional Negligence

Judge Aiken granted defendant's motion for partial summary dismissing plaintiff's claim of professional negligence.

The court relied on the standard of care requiring a lawyer to use the care, skill and diligence which would ordinarily be used by lawyers in the community in similar circumstances. Further, the court noted that a plaintiff in a legal malpractice action has to prove that, had it not been for the lawyer's negligence, the plaintiff would have prevailed in the underlying case.

Based on the standard of care required by a lawyer in the circumstances at bar, the court found no basis for professional negligence based on defendant's failure to file a motion to dismiss based on lack of personal jurisdiction, or in filing an answer to the complaint and thus submitting plaintiff to the personal jurisdiction of the Oregon court.

Garner v. Phillips,

CV 04-6329-AA

(Opinion, July 17, 2006)

Plaintiff's Counsel: Claud Ingram

Defense Counsel: Gordon Welborn

Public Safety Exception to Miranda

Judge Brown granted defendant's Motion to Suppress in part. Defendant sought to suppress statements made in response to police questioning after defendant invoked his right to remain silent. Judge Brown was not persuaded by the government's claim that police questioning fell within the public safety exception to *Miranda* as set forth in *New York v. Quarles*, 467 U.S. 649 (1984). The danger faced by police was not "immediate" when they were 20 blocks from where weapons might be located, they did not confront the danger for approximately 90 minutes following questioning of the defendant, and they controlled the timing of their exposure to the potential threat by means of a warrant. Judge Brown also concluded the questions that police asked defendant were reasonably likely to illicit an incriminating response and, therefore, constituted interrogation under *Rhode Island v. Innis*, 446 U.S. 291, 300

(1980).

United States v. Mengis

CV 04-508-BR

(Opinion, August 31, 2006)

Govt Counsel: Pamala

Holsinger

Defense Counsel: Michael

Greenlick

Challenge to Govt Surveillance Program

In a case brought by Al-Haramain Islamic Foundation, Inc. and its attorneys against George W. Bush, the National Security Agency, the Office of Foreign Assets Control and the Federal Bureau of Investigation (collectively, "the government") challenging the legality of the government's warrantless surveillance program, Judge King denied the government's Motion to Dismiss and denied its alternative Motion for Summary Judgment with leave to renew, in order to allow additional discovery. Judge King's opinion dealt with the application of the state secrets privilege, a common law evidentiary privilege that allows the government to deny the discovery of military and state

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secrets.

The government argued first that the very subject matter of the action was a state secret, requiring dismissal of the case. The government then invoked the state secrets privilege over four categories of information that it claimed were central to the plaintiffs' case, arguing that without this information plaintiffs would be unable to demonstrate standing or establish a *prima facie* case, or that without this information the government would be precluded from asserting a valid defense.

Judge King rejected the notion that the subject matter of the suit was a state secret--the surveillance program has been the subject of numerous official statements and reports. Furthermore, the plaintiffs already know whether or not they have been the subject of surveillance due to the government's inadvertent disclosure of a document that allegedly corroborates the plaintiffs' allegations. In addition, Judge King declined to determine at this point in the litigation whether plaintiffs' case or the government's defenses would be affected by the preclusion of privileged information. Judge King suggested that discovery innovations may allow the case to

proceed. Finally, Judge King agreed with the government that plaintiffs should not have access to the allegedly corroborative document, which is classified as Top Secret and is currently being stored at a Secure Compartmentalized Information Facility at the FBI office in Portland. The government neither waived the state secrets privilege nor declassified the document by the inadvertent disclosure. Nevertheless, Judge King suggested that the plaintiffs file *in camera* any affidavits attesting to the contents of the document from their memories to support their standing and to make a *prima facie* case. Judge King also urged the government to consider redactions to the document.

Al-Haramain Islamic Foundation, Inc. et al. v. George W. Bush, et al., CV 06-274-KI

(Opinion, September 7, 2006)
Plaintiffs' Counsel: Jon Eisenberg, Steven Goldberg, Lisa Jaskol, Thomas Nelson, Zaha Hassan, and Jessica Albies.
Govt Counsel: Anthony Coppolino, Andrea Gacki, and Andrew Tannenbaum.

Employment Discrimination

Judge Aiken denied defendant's motion for summary judgment on plaintiff's claims for race discrimination under Title VII of the Civil Rights Act, 42 USC

§ 2000e, and Or. Rev. Stat. § 659A.

Plaintiff, African American, worked as a cook for the defendant. Defendant challenged only the fourth prong of plaintiff's *prima facie* case; defendant alleged that plaintiff had no evidence to show he was treated differently than other persons outside his protected class. The court disagreed and found evidence in the record to show that plaintiff was treated differently than other persons outside his protected class. Next, the court found the employer articulated a legitimate, nondiscriminatory reason for the challenged action. Finally, the court found that plaintiff sufficiently articulated that defendant's reason was pretextual based on indirect evidence.

Coleman v. McGrath's Publick Fish House, Inc.,
CV 05-6243-AA
(Opinion, August 1, 2006)
Plaintiff's Counsel: Kevin Lafky
Defense Counsel: Edwin Harnden

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Jolie_Russo@ord.uscourts.gov
503-326-8252